

NOTICE TO THE BAR

AMENDMENTS TO GUIDELINE 4 OF GUIDELINES FOR OPERATION OF PLEA AGREEMENTS IN THE MUNICIPAL COURTS

The Supreme Court has approved amendments to Guideline 4 ("Limitation") of the Guidelines for Operation of Plea Agreements in Municipal Courts (Guidelines), to be effective July 1, 2005. Published with this notice are the Court's June 7, 2005 order and amended Guideline 4. As amended, Guideline 4 no longer permits the dismissal by plea agreement of a refusal to provide a breathalyzer charge (refusal), N.J.S.A. 39:4-50.4a, for first offenders. The Guideline does permit a plea agreement to sentence a refusal concurrently with a charge for driving while intoxicated (DWI), N.J.S.A. 39:4-50. The Court also clarified that plea agreements in which a defendant charged with DWI with a blood alcohol concentration (BAC) of 0.10% or higher seeks to plead guilty and be sentenced as if the BAC reading had been 0.08% or higher, but less than 0.10%, are prohibited. The proposed amendments were published for public comment in February 2005.

Given the interest expressed regarding this matter, a review of the background to the Guidelines is helpful. For the past 30 years, the New Jersey Supreme Court has closely regulated the operation of plea agreements in Municipal Courts. In 1974, plea agreements were expressly prohibited.¹ In 1985, the Supreme Court Task Force on Improvement in the Municipal Courts recommended that plea agreements be permitted, subject to certain conditions. Soon thereafter, similar recommendations were made by the New Jersey State Bar Association, the County Prosecutors Association, the Supreme Court Criminal Practice Committee, and the Supreme Court Committee on Municipal Courts (now the Municipal Court Practice Committee).

On June 23, 1988, the Supreme Court issued an "announcement" authorizing a "one-year limited test of regulated plea bargaining in Municipal Courts." The Court found the former lack of professionalism that had permeated most aspects of the municipal courts had significantly changed; that the quality and tradition of the judges had improved; that municipal prosecutors were now in

¹ Municipal Court Bulletin Letter #3-74 contained the following statement: "No plea agreements are permitted in municipal courts on non-indictable offenses. A judge may not accept a plea of guilty to a lesser charge where it appears that a violation of N.J.S.A. 39:4-50 (a) or (b) may have occurred. In such cases, the judge should hear the matter. Where a judge is not satisfied that the prosecution has proven a case under (a), he may find the defendant guilty of (b) as a result of the hearing." Municipal Court Bulletin Letter #9/10-75 stated: "The Supreme Court has recently reaffirmed its policy prohibiting plea bargaining in the municipal courts. The rules in Part III dealing with plea bargaining (Rule 3:25A) are not applicable to the municipal courts. Refer to the item Plea Bargaining in Municipal Court Bulletin Letter # 3-74, page 2."

place in most municipal courts and public defenders in some; and that verbatim records of proceedings were being made. The Court's announcement cautioned that, "[t]he Court is aware, however, of the dangers of plea bargaining if not conducted in carefully controlled professional surroundings," and further required that, "[n]o plea agreement whatsoever will be allowed in drunken driving or certain drug offenses." The Court's announcement indicated the experiment would be evaluated by a special committee.

On October 31, 1989, the Supreme Court Committee to Implement Plea Agreements in Municipal Courts issued its Final Report evaluating the one-year experiment. It recommended that plea agreements be permitted, subject to certain conditions. In DWI cases, it further recommended that where both DWI and Refusal are charged: "The lesser charge (refusal) may be dismissed pursuant to a plea agreement that includes a guilty plea to the greater charge (driving under the influence)." On June 29, 1990, the Court issued its Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey (Guidelines), which adopted the Committee's recommendation regarding plea agreements in refusal cases. The Guidelines are included as an Appendix to the Rules of Court (an Appendix to the Part VII Rules).

In January 2004, the New Jersey Legislature amended N.J.S.A. 39:4-50 to add a new tier of offense for cases with a blood alcohol content (BAC) reading 0.08% or higher, but less than 0.10%. Under this new lower threshold, first offenders face a three-month driver's license suspension. The statute also lowered the minimum license suspension for non-breathalyzer DWI offenses to three months. That offense is most often charged in concert with a refusal charge. In April 2004, the Legislature amended the refusal law to increase the penalties for a first offender to a minimum seven-month license suspension, and to authorize concurrent sentencing in such cases.

As noted, the former Guidelines permitted, in cases involving both a refusal and a DWI charge, only the dismissal of the refusal charge. However, under the new law, the refusal charge now carries the *more severe* driver's license suspension penalty. The result, not surprisingly, has been a significant increase in plea agreements in such cases. In the past year, the majority of first offender refusal cases received only the three-month license suspension on the DWI charge (the refusal charge having been dismissed in the plea agreement). That would seem to be inconsistent with the intent of the Legislature, having just *increased* the minimum suspension period for refusal charges to seven months. Furthermore, the Legislature's authorization for concurrent sentences in these cases further demonstrates its intent that refusal cases should receive at least the minimum suspension of seven months. Finally, there has been substantial concern that motor vehicle drivers will quickly learn that refusal to submit to a breathalyzer would likely lead to a more lenient sentence.

It is against that background that the Court has amended Guideline 4. Accordingly, the amended Guidelines no longer permit a plea agreement that dismisses the refusal charge. The amended Guidelines do permit plea agreements for concurrent sentences on the DWI and the refusal charges.

The April 2004 statutory amendments also directed the Attorney General to issue guidelines concerning the prosecution of DWI and Refusal violations. The Attorney General's guidelines in response to that legislative direction were issued on January 24, 2005, but expressly stated that they were not intended to supercede or otherwise conflict with the Guidelines for Operation of Plea Agreements as promulgated by the New Jersey Supreme Court.

/s/ Philip S. Carchman

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts

Dated: June 15, 2005

SUPREME COURT OF NEW JERSEY

It is ORDERED that the attached amendments to Guideline 4 of the Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, which Guidelines are included in the Rules Governing the Courts of the State of New Jersey as an Appendix to the Part VII Rules, are adopted to be effective July 1, 2005.

For the Court,

/s/ Deborah T. Poritz

Chief Justice

Dated: June 7, 2005

APPENDIX TO PART VII

GUIDELINES FOR OPERATION OF PLEA AGREEMENTS IN THE MUNICIPAL COURTS OF NEW JERSEY

GUIDELINE 1. ... no change

GUIDELINE 2. ... no change

GUIDELINE 3. ... no change

GUIDELINE 4. Limitation. No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:

- A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and,
- B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)); being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b); and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).

No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).

If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath

sample [(N.J.S.A. 39:4-50.2)] (N.J.S.A. 39:4-50.4a) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.

If a defendant is charged with more than one violation under Chapter 35 or 36 of the Code of Criminal Justice arising from the same factual transaction and pleads guilty to one charge or seeks a conditional discharge under N.J.S.A. 2C:36A-1, all remaining Chapter 35 or 36 charges arising from the same factual transaction may be dismissed by the judge on the recommendation of the prosecutor.

Nothing contained in these limitations shall prohibit the judge from considering a plea agreement as to the collateral charges arising out of the same factual transaction connected with any of the above enumerated offenses in sections A and B of this Guideline.

The judge may, for certain other offenses subject to minimum mandatory penalties, refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice requires the acceptance of a plea to a lesser offense.

SUPREME COURT COMMENT (1990) ... no change

Note: Guidelines and Comment adopted June 29, 1990, simultaneously with former Rule 7:4-8 ("Plea Agreements") to be effective immediately; as part of 1997 recodification of

Part VII rules, re-adopted without change as Appendix to Part VII and referenced by Rule 7:6-2 ("Pleas, Plea Agreements"), October 6, 1997 to be effective February 1, 1998; Guideline 4 amended July 5, 2000 to be effective September 5, 2000; Guidelines 3 and 4 amended July 28, 2004 to be effective September 1, 2004; Guideline 4 amended June 7, 2005 to be effective July 1, 2005.